U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

DATE ISSUED: February 17, 1989
CASE NO. 87-INA-582

IN THE MATTER OF THE APPLICATION
FOR AN ALIEN EMPLOYMENT CERTIFI-
CATION UNDER THE IMMIGRATION AND
NATIONALITY ACT

DATAGATE, INC.,
Employer

on behalf of

JAMES GERALD O'CONNOR
Alien

Donald L. Ungar, Esq.
For the Employer

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; Brenner, DeGregorio, Guill, Schoenfeld, and Tureck, Administrative Law Judges

NAHUM LITT
Chief Judge

DECISION AND ORDER

This case arose from an application for labor certification submitted by the Employer on behalf of the Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(14). The Certifying Officer (CO) of the U.S. Department of Labor denied the application, and the Employer requested administrative-judicial review pursuant to 20 C.F.R. §656.26 (1988).[1]

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive a visa unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that there are not sufficient workers who are able, willing, qualified, and available at the time of the application for a visa and admission into the United States and at the place where the

[1] All regulations cited in this decision are contained in Title 20 of the Code of Federal Regulations.

alien is to perform such labor, and that the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must apply for labor certification pursuant to §656.21. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in the Appeal File (A1-A61), and any written arguments of the parties. See §656.27(c).

Statement of the Case

On May 12, 1986, the Employer, which is engaged is the service and repair of Hewlett-Packard (H-P) computer equipment, filed an application for labor certification on behalf of the Alien and listed the job duties as follows:

> Repair and field servicing of Hewlett-Packard 1000 and 3000 computer systems, including hard disk drives, magnetic tape drives, rinters, plotters, terminals and related equipment. (A36).

The employer required a high school diploma or the equivalent, 2 years of electronic technology training, and 2 years of experience in the job offered or 2 years experience in the related occupation of customer service engineer. (A36), The Employer stated that the experience must be with repair and service of H-P 1000 or 3000 computer systems. (A36).

From April, 1980, until August, 1982, the Alien, James O'Connor, was employed in Ireland as a test equipment maintenance engineer, repairing and maintaining computer test equipment. (A60). From August, 1982, until August, 1984, he was employed by International Datagate Systems, in Ireland, as a customer service engineer in the maintenance and repair of H-P 1000 computer systems. (A60).[2] Since August, 1984, he has been employed by Datagate Inc., of Milpitas, CA, as a customer service engineer providing field service maintenance and repair of H.P. 1000 and 3000 computer systems. (A60).

The Employer's recruitment efforts yielded one U.S. applicant, Mr. Timothy Kennedy. The employer found Mr. Kennedy unqualified because he had no field service experience, and no work experience in the repair of Hewlett-Packard 1000 or 3000 series systems. (A38).

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[2] The record is not clear whether International Datagate Systems, and Datagate, Inc., are the same employer such that the Alien did not meet the stated minimum requirements prior to being hired by the Employer. However, since the issue was not raised by the CO in the Notice of Findings and in the Final Determination, we do not address it on appeal.

On February 13, 1987, the CO issued a Notice of Findings, stating that the requirement for experience with a specific type of computer appears restrictive and in violation of Section 656.21(b)(2) and appears to preclude the consideration of an otherwise qualified U.S. applicant. (A33). The CO required that all restrictive requirements be justified or deleted from the job offer. (A34).

The CO found that the U.S. applicant, Mr. Kennedy, had performed the basic duties of the petitioned position since 1978, that he has been employed by Hewlett-Packard since 1979 repairing and servicing computer and ancillary equipment, and that he has taken numerous Hewlett-Packard training courses, although it is not specified whether the courses and the current work include 1000 and 3000 series machines. (A34). The CO concluded, however, that based on Mr. Kennedy's experience with Hewlett-Packard computer systems there is no evidence that becoming familiar with this particular series of equipment would take more than a short period, and that such familiarity could be obtained during the short orientation period normally made available to new employees. (A34). The C.O. required the employer to submit convincing documentation that Mr. Kennedy is incapable of performing the basic job duties. (A34).

On March 17, 1987, the Employer filed its rebuttal statement and related documentary evidence to establish that it had properly rejected Mr. Kennedy. It provided copies of catalogs comparing those items required to be serviced by the person in the position to be filled and those that Mr. Kennedy had experience servicing. (A8-A32). It then summarized its position by stating that Mr. Kennedy had experience only in bench or in-house repair, that his experience was only with desk top products, and that 2 or more years of training would be required for him to perform at a minimal level as a customer engineer. (A4-A6).

On April 3, 1987, the CO issued a Final Determination denying labor certification. The CO found that a qualified U.S. applicant was rejected for other than lawful, job-related reasons in violation of §656.21(j)(i)(iv), in that no evidence was submitted to establish that Mr. Kennedy is incapable of performing the basic job duties. (A2). In support, the C.O. stated that Mr. Kennedy has experience with a large number (although not all) of the components of a typical HP 3000 system, and various testing and related devices, and that based on his several years of experience it would be reasonable to assume that he could become proficient in servicing related equipment. (A3). The CO further stated that according to Department of Labor computer specialists, referring to the manuals for each computer system is standard practice, that a qualified computer specialist would have little trouble servicing a different model within a series by use of a manual and or minimal technical assistance, and that a requirement that an applicant be familiar with all the models listed by the Employer was neither listed nor justified. (A3).[3]

On April 17, 1987, the employer requested administrative-judicial review, and filed its brief in support of that request on August 31, 1987. The Employer argued (1) that the qualified

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[3] In rebuttal, the Employer offered evidence that experience with specific types of computer systems was not unduly restrictive. Since the CO did not indicate in the Final Determination that §656.21(b)(2) was a ground for denial, we infer that the CO accepted the Employer's evidence.

applicant must able to repair or service he computer on the site, be able to service the entire system, and be able to make the repair without referring to a vast amount of information and material, (2) that Mr. Kennedy has experience only with peripherals and less-sophisticated models, (3) that there is a big difference in the system serviced by employer and those in Mr. Kennedy's resume, and (4) that Mr. Kennedy has only bench or depot technicians experience which is different from that of a field service engineer operating with limited tools and on the basis of his own knowledge. Based on the above, the Employer concluded that its requirement of 2 years field service experience is reasonable for a smaller company with a reputation for highly qualified service people.

Discussion and Conclusion

The CO denied the application for certification on the ground that the Employer rejected a U.S. worker for other than lawful, job-related reasons, under §656.21(j)(1). The CO stated that the U.S. applicant, Mr. Kennedy, met the Employer's stated qualifications for the job offered. "Where the job requirements stated in the application have not been found to be unduly restrictive, an applicant who does not meet the requirements is not qualified for the job." Harris Corp., 88 INA 293 (Jan. 5, 1989); Concurrent Computer Corp., 88 INA 76 (Aug. 19, 1988).

The Employer's stated minimum requirements for the position included two years experience as a customer service engineer, servicing H-P 1000 or 3000 systems. According to Mr. Kennedy's resume, he has experience with Hewlett-Packard as an electronics technician. The Employer stated that Mr. Kennedy was not qualified because he only has experience as a bench or in-house technician and not as a field engineer. The CO, in the Notice of Findings, required the Employer to document why Mr. Kennedy could not perform the basic job duties. On rebuttal, the Employer further listed the differences between a field service engineer and a bench technician and concluded that Mr. Kennedy was unqualified. Although the CO stated in the Final Determination that Mr. Kennedy has experience repairing many of the systems listed by the Employer, the Employer has shown that Mr. Kennedy's experience was as a technician and not as a field service engineer.

Since the U.S. applicant does not meet the Employer's stated and unchallenged job requirements, the Employer did not reject the U.S. applicant for other than lawful, job-related reasons under §656.21(j)(1).[4]

ORDER

[4] The dissent argues that pursuant to §656.24(b)(2)(ii), the CO may raise the issue that although the U.S. applicant may not meet the employer's stated requirements, the applicant may nevertheless be qualified to perform the job, in a normally acceptable manner, by a combination of education, training, and experience. In the instant case, however, the CO did not raise §656.24(b)(2)(ii). Unless, the CO raises an issue in the Notice of Findings and in the Final Determination, we will not consider the issue on appeal.

The Certifying Officer's Final Determination is REVERSED, and the application for labor certification is hereby GRANTED.

NAHUM LITT
Chief Administrative Law Judge

NL:WB

In the Matter of DATA GATE, INC., 87-INA-582
Judge LAWRENCE BRENNER, dissenting:

I dissent on the same basis of part of my dissent in Adry-Mart, Inc., 88-INA-243 (Feb. 1, 1989). I disagree that the analysis should end with a determination that a U.S. applicant is not qualified if he does not meet all of the job requirements specified by the employer which are not found to be unduly restrictive. This would be enough for an employer to establish a prima facie case that a U.S. applicant was properly rejected. However, in my view, pursuant to section 656.24(b)(2)(ii), the C.O. may overcome this case by coming forward with evidence that the applicant is nevertheless qualified to perform the job in a normally acceptable manner by a combination of education, training and experience which compensates for the requirements which the applicant lacks.

In this case, I believe the C.O. has come forward with enough to show that U.S. applicant Kennedy's extensive experience with Hewlett-Packard, repairing and servicing the same or similar components of H-P systems for which the Employer seeks a field service engineer, render him qualified to perform the job, with no more than a brief orientation period normally incident to any new employment of even a qualified applicant. In the face of this, the Employer has not satisfied its ultimate burden of proof that Kennedy is unqualified because his repair work was in the shop rather than the field, or because he lacks experience with either of the entire H-P 1000 or 3000 computer systems specified by the Employer.

The C.O. in his Notice of Findings did challenge as unduly restrictive the requirement of familiarity with the specific type of computer systems as applied to Kennedy (AF 34). However, he abandoned this ground in the Final Determination, believing instead that the requirement be interpreted as experience repairing those systems, not each and every component (AF 3). With this interpretation, the C.O. found that Kennedy met the stated requirement of two years of experience repairing H-P 1000 or 3000 systems (Id.). I agree.

The only other requirement which Kennedy allegedly did not meet is experience in field repair. The C.O. does not treat this as a requirement, and I am inclined to agree. As an alternative to two years experience in the job offered, the Employer would accept two years experience as a customer service engineer (AF 36). This does not expressly require that the repair and service be in the field.

In any event, if Kennedy did not exactly meet the stated requirements as interpreted by the majority, he came close enough to be able to do the job based on his education, training and experience. This is the circumstance which section 656.24(b)(2)(ii) addresses.

LAWRENCE BRENNER
Administrative Law Judge